IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 20932

KENNETH G. STOREY, JR.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

APPELLANT'S REPLY BRIEF

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INTRODUCTORY REMARKS[1]

Counsel for Appellant sincerely feels that the Government has failed, due to the merits of Appellant's cause, to meet the basic arguments in the Opening Brief. Therefore, the arguments and cases set forth in the Opening Brief

1. In this Reply Brief (OB) shall refer to the Appellant's Opening Brief, (AB) to the Appellee's Answering Brief and (EX) to Government's Exhibit No. One.

will be relied on when any portion of the Government's Brief is not specifically commented on.

A note of warning. A major approach used by the Government throughout the Answering Brief is the selection and emphasis of certain facts to the absolute exclusion of others. This results in some misimpressions.

Therefore, it is essential to the merits and justice of Appellant's cause, that all the facts, in their chronological order, be kept in mind. The facts themselves will answer all the direct questions asked by the Government and refute the innuendos raised. Please see pages 3 through 8 of the Opening Brief.

ARGUMENT

I

The Local Board's Failure to Respond to Appellant's Inquiry, or to Refer Him to a Source for Advice—a Selective Service Appeal Agent or Advisor—Deprived Him of Crucial Counsel and Advice and Induced Him into the Very Circumstances upon Which Selective Service Is Denying His I-O Classification.

Government argues: That the local board had no *duty* to provide advisors under Selective Service Regulation 1604.14. (AB 8, 9).

Reply argument:

(1) This is a red herring. Nowhere does Appellant contend that the local board had a duty to appoint or post advisors. The Government is attempting to cloud the issue by conjuring up this point. It is obviously moot, because advisors were appointed and posted. (OB 4). Further-

more, the local board couldn't appoint an advisor under any circumstances. The Regulation vests the power in the Director of Selective Service.

(2) What the Appellant does contend on this point is clearly set forth in his Brief. The Appellant's argument is strengthened by the Uffelman case cited by the Government. It holds that one of the very reasons a failure to appoint an advisor does not violate due process is because the local board acts in that capacity. *Uffelman* v. *U. S.*, 230 F.2d 297 (9th Cir. 1956), at pages 300, 301.

Government argues: The Appellant wrote his local board and suggested his work at Boeing was connected with warfare (AB 9). They then state, "Why did he continue said employment after he *knew* this?" (AB 9-11).

Reply argument:

(1) This question is fully answered by the facts [OB 3, 4; 39(c)] and was even brought out in Appellant's testimony. (December 6 Transcript of Proceedings, pp. 29, 30). The Appellant simply expressed this belief upon first embracing the principles of his newly found religion. Subsequently he was advised by church members, also employed at Boeing, that his work was proper in the eyes of the Church. This is what prompted the Appellant to ask his local board and the Hearing Officer how Selective Service viewed his work at Boeing. (OB 4, 5).

(2) The Appellant's writing his local board and suggesting his work at Boeing was connected with warfare, is not the "hanging evidence," as suggested by the Government. To the contrary, it is evidence which further tends

to prove the unquestioned sincerity of the Appellant. It is just another piece of evidence to show that the Appellant would have terminated his job at Boeing immediately had Selective Service or the Department of Justice simply advised him what their hard-line unresilient policy was regarding this type of work.

(3) The Government keeps emphasizing that the Appellant "knew" the nature of his work. Yes, he did *know* that his work was proper in the eyes of his church. But he did *not know* how Selective Service viewed his work and that is exactly what he tried to find out. It is not *what he knew* that has resulted in the prosecution of the Appellant, but what *he did not know*—what was willfully withheld from him by Selective Service—that caused the problem.

Government argues: The Appellant wanted to continue in a "lucrative defense job." (AB 11).

Reply argument:

(1) Was the Appellant in a "lucrative defense job"? Was he making more money as a draftsman on ground support equipment than he was making in the Civil Transport Division at Boeing? Was he making more money than he would be at any other job in the Seattle area? Was he making more money than he is at his present job? There is just no basis for this accusation.

(2) Appellant expressed his willingness to work under the I-W Work Program, the alternate form of service for conscientious objectors. (Ex. 155). He was over 23 years old when he appeared before the local board. Had

they given him a I-O at that time he would have been immediately eligible for assignment under the I-W Work Program working for the average rate of between .85¢ and $1.25 per hour.

Government argues: What constitutes defense work is a "complex legal question."

Reply argument:

(1) If the question was too complex, the local board or the Hearing Officer should have at least told the registrant that they could not give him an answer or referred him to a Selective Service advisor or appeal agent.

II

The Appellant Was Denied Due Process When Ostensibly Derogatory and Adverse Evidence Was Placed Before the Appeal Board That He Was Never Informed of nor Afforded the Opportunity to Rebut.

No place does the Government deny that the contents of the letter in question were derogatory. No place do they contend that the Appellant had knowledge of it.

Government argues: Other rebuttal was filed with no thought of the derogatory letter in mind. That this rebuttal evidence incidentally concerned the derogatory information and, therefore, satisfied Appellant's right to directly and intelligently rebut the adverse evidence against him. (AB 12, 13).

Reply argument:

(1) The Government's argument is repugnant to the fundamental concepts of due process. To clearly understand it is to reject it.

> "Basic to the very idea of free government and among the immutable principles of justice which no State of the Union may disregard is the necessity of due 'notice of the charge and an adequate opportunity to be heard in defense of it.' " The Constitution of the United States Analysis and Interpretation (88th Congress 1st Session Document No. 39), p. 1267 citing *Powell* v. *Alabama,* 287 U.S. 45, 68 (1932); *Snyder* v. *Massachusetts,* 291 U.S. 97, 105 (1934).

The Government would turn the Selective Service proceedings into a game of Blind Man's Buff contrary to the admonishment in *Simmons* v. *U. S.,* 348 U.S. 397 at 405.

(2) The Government is asking the Court to assume that the Appellant had no further evidence available to rebut the secretive letter. They say surely the other letters filed were "ample to rebut one possible derogatory letter." (AB 13). They suggest that the counting of letters supplants the weighing of evidence intelligently submitted. The Government, however, does not consider the secret derogatory letter as being rebutted. They attempt to use it on page 10 of their Brief to the detriment of Appellant's position.

III

The Local Board Misinterpreted and Misapplied the Regulations When It Considered the New Information, Filed by Appellant, under the Erroneous Impression It Had to Warrant the Authority of the State Director to Reopen.

IV

The Local Board Acted Arbitrarily and Without a Basis in Fact When It Refused to Reopen the Appellant's Classification After Receiving New Information Regarding a Change in His Status.

It should be noted that the Government's attempt to merge these two distinct propositions has resulted in their avoiding the arguments presented.

Government argues: The new evidence filed by Appellant was considered by the Appeal Board. (AB 16).

Reply argument:

(1) A registrant has at least two opportunities to achieve a requested classification. First before the local board, then, in the event of an adverse classification, by the Appeal Board [50 Appendix 460(b)(3)]. Then, even after the Appeal Board has acted, the local board must reopen a classification upon new evidence being filed (32 CFR 1628.26(b); 1625.2). Upon reopening the registrant is entitled to another personal appearance hearing before his local board. (32 CFR 1625.11; 1625.13).

The Government suggests that the Appellant's right to have his new evidence first considered by the local board, the first step in the orderly process of Selective-Service procedure, be circumvented as of no consequence.

This Court has labeled classification by the local board as "the keystone of the process of induction." *Ayers* v. *U. S.*, 240 F.2d 802, 809 (9th Cir. 1957). And that "classification by the local board is an indispensable step in the process of induction." *Knox* v. *U. S.*, 200 F.2d 398, 402 (9th Cir. 1952).

As this Court stated in *Franks* v. *U. S.*:

> "We pointed out the fact that in consideration of a claim of conscientious objection and of the question whether a registrant should be so classified, *the personal appearance of the registrant before the local board is of major and commanding importance.* The Appeal Board, notwithstanding it has the aid of a written report from the Hearing Officer, has no similar opportunity to judge of the genuineness, the sincerity and the extent of a registrant's conscientious objection to military service. Therefore, *a registrant who fails to have a fair chance for his proper classification on his appearance before the local board has been denied something that cannot be cured through the action of the Appeal Board. . . .*"
>
> "This brings us to the conclusion that the failure of the local board to comply with the Regulation referred to renders the registrant's classification and his induction order invalid. It was incumbent upon the U.S. in this prosecution to prove a valid induction order as a basis for Appellant's conviction." 216 F.2d 266, 270 (9th Cir. 1954). Also see *Knox* v. *U. S.*, 200 F.2d 398 (9th Cir. 1952); *U. S.* v. *Craig*, 207 F.2d 888, 891 (3rd Cir. 1953).

Government argues: That the Appellant did not request a reopening in his new evidence. (AB 16).

Reply argument:

(1) Counsel is fully aware of the peril in going outside the record. He has, however, in deference to the limited funds of the Appellant only had extracts of the testimony prepared. As an officer of the court counsel states that this very point was raised by the Government during the hearing of January 21, 1966, and that the Trial Court rejected it. (Transcript of Proceedings of January 21, 1966, p. 3). As the Government did not preserve this point on appeal they are now barred from having it reviewed. If the Government does not concede this point, Appellant moves the Court to have the entire argument of counsel on said date prepared. And, inasmuch as the same was inadvertently omitted, to have the Clerk of the District Court transmit the same to Appellate Court under Rule 75(b) of the Rules of Civil Procedure.

(2) This point is further without merit in that the Appellant *did* request a reopening. In his letter the Appellant stated, "I *appeal* to you to grant my desired classification of I-O." (Ex. 123). Not only was the wording of this sentence in and of itself tantamount to a request for reopening, but in addition thereto, the case of *Wyman* v. *LaRose,* 223 F.2d 849 (9th Cir. 1955) held that although the registrant used the word "appeal" in his letter, that "the context clearly showed that Appellee was not thereby taking an appeal, but was, in effect, requesting the local board to reopen his classification and consider it anew."

(3) Even if no request for reopening was made, it would be totally irrelevant to the facts in our case. The reason being, in our case the board, in fact, did convene to consider the evidence. The wrong under our facts is that they misapplied the law in their refusal to reopen. In the cases cited by the Government the local boards never convened to consider the evidence and this was allegedly justified by the fact that no request was made for reopening.

Government argues: That the latter part of Selective Service Regulation 1625.2(b) is applicable and that the local board need not reopen a classification after an induction order has been sent unless the local board specifically finds that there is a change in circumstances beyond the control of the registrant.

Reply argument:

(1) The section of the Regulation relied upon by the Government is only applicable when the alleged new facts have occurred *after* the notice of induction has been sent. In our case the new evidence occurred *before* and was likewise filed with the local board *before* the induction order was issued.

VI

The I-A-O Classification Given Appellant by the Appeal Board Was Illegal, Arbitrary, Capricious and Without a Basis in Fact.

Again Appellant would renew his request that the Court keep all the facts in mind in their chronological order in reviewing this section. [OB 3-8; 39(c)].

Government argues: The local board denied the Appellant's conscientious-objector claim based in part on his demeanor and credibility. (AB 21).

Reply argument: There is no citation of authority for this statement. It is unfounded and unwarranted. It is an abortive attempt to create a question of Appellant's credibility when in fact it is impeccable.

Government argues: The Hearing Officer stated Appellant appeared to be embarrassed and uncertain in his attempted justification of his employment at Boeing. (AB 21).

Reply argument:

(1) Appellant's work at Boeing was in accord with his religious belief. The Hearing Officer found the Appellant to be *sincere* in his representations as to his religious training and belief. (OB App. B, p. 4). The only thing Appellant was "uncertain" about was how Selective Service viewed his work at Boeing. As we have seen, he attempted to resolve this uncertainty with both the local board and Hearing Officer but to no avail.

Government argues: That Appellant was "given every available opportunity to prove his claim . . . but failed to convince anyone." That Appellant's case was not based on "one isolated fact."

Reply argument:

(1) The local board failed to reopen Appellant's classification so he could personally appear and convince them of the sincerity in his motivation for quitting Boeing. Both the local board and the Hearing Officer failed to notify the Appellant of the hard-line policy followed regarding defense

work so as to afford him the *opportunity* to quit. The Appeal Board failed to notify the Appellant of the derogatory letter so as to afford him the *opportunity* to rebut it.

(2) The Government does only have "one isolated fact" on which it is attempting to base its I-A-O classification and that is the employment at Boeing. What other fact justifies such a classification?

(3) The Appellant did convince the Hearing Officer of his claim for exemption. He found him to be sincere in the representation of his religious beliefs and recommended "that he not be exempted from . . . service of an assigned public nature. . . ." (OB App. B, p. 4).

VII

The Department of Justice Based Its Recommendation to the Appeal Board on an Illegal Basis When It Stated There Was Nothing in Appellant's Religious Training and Belief That Would Prohibit Him from Service in a Noncombatant Capacity

Government argues: The Appeal Board was not bound to follow recommendation of Department of Justice and cites *Ashauer* v. *U. S.*, 217 F.2d 788 (9th Cir. 1954).

Reply argument:

(1) The rationale of the 1954 Ashauer case was supplanted by the Supreme Court case of *Sicurella* v. *U. S.*, 348 U.S. 385, 391 (1955). Ashauer is also distinguished on the facts because the Court stated on page 791 that there were "factors in the case which militate against assuming the Appeal Board relied on the recommendation."

IX

The Court Erred in Sustaining the Government's Objection to the Introduction of Testimony from Certain of Appellant's Witnesses.

Government argues: That the exclusion of the testimony of Appellant's witnesses was proper because the Court is limited to the evidence which was before Selective Service. They cite the cases of Cox and Ashauer.

Reply argument:

(1) The Ashauer case reverses a judgment of conviction and holds for the defendant. The Court merely states on page 792 that the Government cannot use alleged discrepancies in the defendant's testimony to destroy the valid claim he already made. Again, the witness was allowed to testify and was not deemed disqualified.

(2) The Cox case was considered with one Thompson. Cox actually was permitted to testify. Thompson was not allowed to testify. But the question is, what evidence did the Court refuse to receive? On page 446, we read, ". . . (T)hat Thompson was not allowed to testify *concerning his duties as a minister.*"

The Cox case is distinguished in that the Appellant never attempted to introduce evidence the sole purpose of which was to further augment the *sincerity* of his conscientious objector beliefs. The purpose of the testimony of Appellant's witnesses was solely to show a violation of due process or simply elaborate and tie together the facts and documents already in the file.

To deny this right to a registrant would mean that it would impute to him, as a layman, the duty of knowing every single important and relevant fact that will be of importance to him at trial, and require him to file it before Selective Service. The Appellant refers the Court to the dissenting opinions of Justices Murphy and Rutledge on page 457.

(3) The Court should also note that the legal reason now given to sustain the Court's refusal of admitting such testimony, were not the reasons given in their objection to such testimony. (OB 11, 12).

(4) In the case of *Elder* v. *U. S.*, 202 F.2d 465 (9th Cir. 1953), on page 467 the Court refused to receive certain testimony. The defendant failed to make an offer of proof. The Appellate Court held the refusal to admit the evidence was not error, *only* because no offer of proof was made upon which they could determine if it was of a prejudicial nature. They did not automatically refuse it because it is barred ipso facto. The evidence had to do with the fact that the Hearing Officer made an incomplete and incorrect report of the hearing.

(5) The Government's argument would be tantamount to disqualifying all witnesses. This is not the case, for we see that in Cox, Ashauer and Elder witnesses were permitted to testify.

CONCLUSION

> "In a criminal prosecution of this kind, the burden is upon the Government to establish the validity of the induction order, and if the matter which we here mention has a bearing upon that validity, (which we will discuss hereafter), then we must view the record in the light most favorable to the appellant as we proceed to construe its meaning." *Franks* v. *U. S.*, 216 F.2d 266, 269 (9th Cir. 1954).

But regardless of how we view the record there is *at least* a reasonable doubt as to his guilt. Nowhere is his sincerity questioned. Nowhere is there found a basis in fact.

Therefore, counsel for the appellant ardently requests that the judgment of the Trial Court be reversed.

CERTIFICATION

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

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